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IN THE
Supreme Court of the United States

October Term, 1963

No. 461

HERBERT APTHEKER and ELIZABETH
GURLEY FLYNN,

Appellants,

v.

THE SECRETARY OF STATE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Herbert Aptheker and Elizabeth Gurley Flynn, appellants, having appealed from the final order of a three-judge court of the United States District Court for the District of Columbia granting appellee's motion for summary judgment, dismissing appellants' complaints and denying appellants' motions for summary judgment and their requests for permanent restraining orders, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion below (F. R. 117-31; Appendix A, *infra*) has not yet been officially reported.

¹ "F. R." refers to the Flynn record, "A. R." to the Aptheker record. Where the same document appears in both records, we will refer only to F. R.

Jurisdiction

Appellants brought actions in the United States District Court for the District of Columbia for judgments (a) declaring unconstitutional section 6 of the Subversive Activities Control Act (hereafter called the Act), 64 Stat. 993, 50 U. S. C. 785; (b) enjoining the Secretary of State, because of the unconstitutionality of section 6, from enforcing it against them by continuing in effect his revocation of their passports, and (c) requiring him to reissue passports to them. The actions, which were consolidated in the court below (F. R. 46), were brought under D. C. Code, secs. 11-305 and 11-306; 28 U. S. C. 2201, 2282, and 2284; and sec. 10 of the Administrative Procedure Act, 5 U. S. C. 1009. (A. R. 4-7; F. R. 4-6.)

The judgment below (F. R. 132; Appendix B, *infra*) is dated and was entered on August 2, 1963. Each appellant filed a notice of appeal in the court below on August 9, 1963 (A. R. 61; F. R. 134).

Jurisdiction of this appeal is conferred on the Court by 28 U. S. C. 1253. The following decisions sustain the Court's jurisdiction: *Schneider v. Rusk*, 372 U. S. 224; *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713; *Florida Lime Growers v. Jacobsen*, 362 U. S. 73; *Bauer v. Acheson*, 106 F. Supp. 445. Cf. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-55.

Statutes Involved

Section 6 of the Subversive Activities Control Act, 64 Stat. 993, 50 U. S. C. 785, provides:

Sec. 6(a): When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.²

The pertinent portion of section 15(c) of the Subversive Activities Control Act, 64 Stat. 1003, 50 U. S. C. 794(c), provides:

(c) * * * Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

Questions Presented

Whether section 6 of the Subversive Activities Control Act is unconstitutional on its face or as applied.

Statement of the Case

The relevant facts are not in dispute.

Appellants are American citizens by birth, and on January 21, 1962, were the holders of United States passports (A. R. 4, 11; 18; F. R. 4, 14, 21).

² Former subsection (c) of Section 6 was repealed August 24, 1954, 68 Stat. 778.

On April 20, 1953, the Subversive Activities Control Board (hereafter called the Board) issued an order requiring the Communist Party of the United States to register as a Communist-action organization under section 7 of the Act, 64 Stat. 993, 50 U. S. C. 786. This order became final on October 20, 1961 (F. R. 118). See *Communist Party v. S.A.C.B.*, 367 U. S. 1, rehearing denied, 368 U. S. 871; Act, sec. 14(b), 64 Stat. 1102; 50 U. S. C. 793(b).

On January 22, 1962, the Acting Director of the Passport Office notified appellants that their passports were revoked by direction of the Secretary of State because of the belief of the Department of State that appellants' use of the passports would violate section 6 of the Act (A. R. 22; F. R. 25). Appellants thereupon secured administrative review of this action pursuant to the departmental regulations, 22 C. F. R. Chap. 1, Part 51 (F. R. 109-12):

Administrative hearings were followed by decisions of the Director of the Passport Office affirming the passport revocations (A. R. 23-24; F. R. 26-27). Appeals to the Board of Passport Appeals resulted in a finding in each case that "there is a preponderance of evidence in the record to show that at all material times [each appellant] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act." On the basis of these findings, the Board recommended affirmance of the decisions of the Passport Office. The recommendations in the two cases were approved by the Secretary of State on October 18 (Flynn) and November 23, 1962 (Aptheker), respectively. The Secretary adopted the finding as to each appellant quoted above and confirmed the revocations of their passports on the basis of his conclusion that use of the passports by appellants would violate section 6 of the Act. (A. R. 25-26; F. R. 28-30).

Dr. Aptheker is a well-known scholar in the fields of history, political science and sociology. He was, at the time of the administrative hearing, editor of *Political Affairs*, the theoretical organ of the Communist Party of the United States. He is the author of fourteen books and has edited or contributed to several others, including the official History of the Army Ground Forces in World War II. He is also the author of some thirty pamphlets and numerous articles and reviews in scholarly journals. He has lectured at many universities, colleges and other forums. In 1959 and 1960 he travelled to Europe, and while there lectured before various learned academies and universities. In 1961 he delivered papers before the Japanese Historical Association in Tokyo and at the University of Tokyo. The revocation of his passport prevented him from accepting invitations to attend a world gathering of historians at Dresden, Germany, to deliver a series of lectures on the American Civil War at Humboldt University, and to attend an assemblage of scholars in Accra, Ghana, for a discussion of the projected Encyclopedia Africana. His inability to travel to Europe also denies him access to overseas archives and depositories necessary for his historical studies, including continuation of his work on *The History of the American People*, of which the first two volumes have been published. Dr. Aptheker desires to travel to Europe and elsewhere to pursue his historical studies, attend meetings of learned societies and scholars, exchange opinions with fellow historians, lecture at foreign universities, and observe conditions and gather material for his writing and lecturing in this country (A. R. 18-20; F. R. 128.)

The court below found on the basis of the administrative record that Mrs. Flynn is Chairman of the Communist Party of the United States. (F. R. 128). She has for many years written under her by-line a weekly column for the newspaper, *The Worker* (formerly *The Daily Worker*). She is the author of two books, including the first volume

of a planned two-volume autobiography. She lectures extensively throughout the United States. She has made a number of trips to Europe and desires to travel there again for rest and recreation, to gather material for use in writing and speaking to American audiences, and to lecture to European audiences (F. R. 21-23).

The denial of passport facilities to appellants makes it unlawful for them to travel outside of the Western Hemisphere. Because of the basis of the Secretary's action, it would be futile for appellants to apply for new passports. Moreover, any such application would invite criminal prosecution for violation of section 6.³ (A. R. 3, 12-13; F. R. 5, 15-16, 121.)

The sole ground for appellants' challenge of the Secretary's action in the court below was that section 6, on its face and as applied to them, is unconstitutional (A. R. 4-7; F. R. 4-6). In view of that fact and of appellants' request for injunctions requiring the Secretary to reissue passports to them, they applied for a three judge court which was convened in the consolidated action, with the

³ The passports which the Secretary revoked would have expired by their terms on December 9, 1962 in the case of Dr. Aptheke and on March 9, 1963, in the case of Mrs. Flynn (F. R. 118). No claim of mootness on that account has been made, or would be warranted. The controversy as to the validity of section 6 and the determination of the Secretary that appellants are ineligible for passports still remains. Mootness is precluded by the short-term order or license doctrine. *Southern Pac. Term. Co. v. I.C.C.*, 219 U. S. 498, 514-15; *Southern Pac. Co. v. I.C.C.*, 219 U. S. 433, 452; *Leonard v. Earle*, 279 U. S. 392; *Technical Radio Lab. v. Fed. Radio Comm.*, 36 F.2d 111. The doctrine is fortified here by the fact that under section 6 appellants cannot reapply for passports without facing criminal prosecution.

agreement of the Secretary, pursuant to 18 U. S. C. 2282 and 2284 (F. R. 117).⁴

Appellants moved (A. R. 17; F. R. 20) and the Secretary cross-moved (F. R. 52-53) for summary judgment. The court below granted the Secretary's motion and dismissed the complaints, denying appellants' motions and their requests for injunctive relief (F. R. 132).

The Questions Are Substantial

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . . Freedom of movement also has large social values." *Kent v. Dulles*, 357 U. S. 116, 125-126. Accordingly, the Court stated (at 130): "We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations."

Section 6 of the Act requires the Secretary to withhold passports from citizens solely because of their association as members of certain organizations. This case therefore presents the "important constitutional questions" which

⁴ The injunctions sought by appellants on the ground of the unconstitutionality of section 6 would restrain the enforcement, operation and execution of section 6 by requiring the Secretary to issue passports to appellants without regard to whether they are members of the Communist Party and notwithstanding the fact that he has reason to believe that they are, as he found, members of the Communist Party.

the Court did not reach in *Kent*, and consideration of which was held to be premature on review of the order requiring the Communist Party to register under the Act, *Communist Party v. S. A. C. B.*, 367 U. S. 1, 79. These questions arise under the due process clause and the First Amendment.

1. Due Process.

Section 6 violates due process in three respects.

(a) The section bars an individual from travelling abroad solely because he is a member of an organization which has been finally ordered by the Board to register as a Communist-action or Communist-front organization.⁵

The legislative justification for section 6 is stated in the finding of section 2(8), 50 U. S. C. 781(8), that travel by Communists is a prerequisite for the carrying on of activities to further the nefarious purposes which section 2 ascribes to the world Communist movement (see *infra*, p. 11). However, since section 6 applies to all members of a described organization, it bars travel by members who are inactive or who participate only in the lawful activities of the organization, who are personally innocent of any wrongful conduct, who do not know or believe that the organization has the characteristics attributed to it by the Board,⁶ and whose proposed travel is for legitimate and even laudable purposes.

⁵ The term "Communist organization" used in section 6 is defined by section 3(5) of the Act, as amended, 50 U. S. C. 782(5), to include Communist-action, Communist-front and Communist-infiltrated organizations. The last, however, are not subject to a registration requirement. See section 7, 50 U. S. C. 786.

⁶ Section 6(a) applies if the member has knowledge or notice that the organization is registered or that the registration order against it has become final. Under section 13(k) of the Act, 50 U. S. C., 792(k), publication in the Federal Register of the fact that a registration order has become final constitutes notice of that fact to all members of the organization.

Section 6 thus creates a conclusive presumption that all members of proscribed organizations, whenever they travel abroad, will, or will be likely to, engage in activities endangering the national security. The section is, therefore, an extreme instance of the imputation of guilt from association. *Schneiderman v. United States*, 320 U. S. 118, 154-155, doubted the permissibility of imputing to an officer of the Communist Party personal belief in the Party's alleged tenets of force and violence. Section 6 goes much further. It imputes both an ideology and a propensity to engage in specific criminal conduct. And it imputes these not only to officers of the Communist Party, but to all its members and to non-Communist members of front organizations.

The un rebuttable presumption created by section 6 is not credible, is contrary to experience, and is unnecessary to meet the alleged evil. Section 6, therefore, imposes a discrimination which is "so unjustifiable as to be violative of due process" (*Bolling v. Sharpe*, 347 U. S. 497, 499) and runs afoul of the due process requirement that deprivations of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia v. New York*, 291 U. S. 502, 525; *Perez v. Brownell*, 356 U. S. 44, 58. The section likewise violates the precept that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 86. See also, *Tot v. United States*, 319 U. S. 463.

It is established that due process prohibits the imposition of criminal sanctions or civil disabilities for membership in the Communist Party when unaccompanied by knowledge of the organization's alleged illicit purposes and the intent to effectuate them. *Scales v. United States*, 367 U. S. 203, 224-28; *Adler v. Board of Education*, 342 U. S. 485, 494-96; *Wieman v. Updegraf*, 344 U. S. 183. Section 6 contravenes this principle.

(b) In accordance with section 6, appellants have been denied passports on the basis of a finding, made in a proceeding to which they were not parties, that the Communist Party is a Communist-action organization. This procedure violates the due process principle that persons may not be deprived of liberty or property without a hearing at which they may contest the alleged factual basis for the deprivation. *Heiner v. Donnan*, 285 U. S. 312, 325; *Mobile, Jackson & K. C. Ry. v. Turnipseed*, 219 U. S. 35, 43; *Ohio Bell Telephone Co. v. P. U. C.*, 301 U. S. 292, 301-02; *Renaud v. Abbott*, 116 U. S. 277, 288; *Noto v. United States*, 367 U. S. 290, 299. Cf. *Kirby v. United States*, 174 U. S. 47. This due process defect is magnified by the fact that the issue as to which appellants are precluded under section 6—whether the Communist Party is a Communist-action organization—supplies the only possible constitutional justification for the passport sanction. Yet *United States v. Carolene Products Co.*, 304 U. S. 144, 152, states “that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.”

Moreover, the finding that the Communist Party is a Communist-action organization was made by the Board on April 20, 1953, the date of its order. *Communist Party v. S.A.C.B.*, *supra*, at 19-20. Yet section 6 precludes appellants from showing that this ten-year-old finding is no longer tenable.⁷ The section thus violates the due process principle that “the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that these facts have ceased

⁷ As the Chief Justice's dissent in the *Party* case (at 133, n. 11) pointed out, the Board's finding was based on a “dubious” presumption of continuity applied to “stale evidence” of pre-1940 events.

to exist." *United States v. Carolene Products Co.*, *supra*, at 153; *Chastleton Corporation v. Sinclair*, 264 U. S. 543.⁸

(c) The findings of the Act which state Congress' justification for section 6 have no foundation in the facts with respect to the Communist Party. This appears from the findings made by the Board in the proceeding to require the Party to register under the Act.

Section 2(8) of the Act, 50 U. S. C. 781(8), finds that "travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." The "purposes of the Communist movement" are elsewhere described in section 2 as being the overthrow of existing governments, by the use of illegal means if necessary, and their replacement by "Communist totalitarian dictatorships" subservient to the Soviet Union. Section 2(1), (2), (3), (6), 64 Stat. 987-88; 50 U. S. C. 781(1), (2), (3), (6); *Communist Party v. S.A.C.B.*, *supra*, at 55. Both aspects of these ex parte legislative findings are belied by the findings made by the Board on the basis of the voluminous evidence adduced in the proceeding which resulted in the Board's registration order against the Communist Party.⁹

⁸ There is no provision of the Act permitting members of the Communist Party to secure a redetermination of its status. Nor can the Party itself do so. Only registered organizations may petition for redetermination. Section 13(b), 50 U. S. C. 792(b). The Party has not registered and is presently litigating the constitutional objections to the registration requirement which were held to be premature in *Communist Party v. S.A.C.B.*, *supra*. See *Communist Party v. United States*, No. 17,583, C. A. D. C. The statement in the opinion below (F. R. 124) that the procedures of Section 13(b) are available to the Party is, therefore, erroneous.

⁹ The relevant findings of the Board are continued in its Modified Report of December 18, 1956, which appears in the transcript of the record in *Communist Party v. S.A.C.B.*, No. 537, October Term, 1959. Page references herein to the Modified Report are to the pages of that record. The Modified Report is also an exhibit in the Flynn record.

The Board made the conclusory finding (p. 2644) that the Communist Party, "is substantially directed, dominated and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act, and operates primarily to advance the objectives of such world movement." Yet, contrary to the section 2(8) finding that foreign travel is a prerequisite to furtherance of the purposes of this movement, the Report of the Board contains no finding of significant travel by Communist Party members to foreign countries or by foreign Communists to this country after 1936.¹⁰ Accordingly, section 2(8) cannot furnish a justification for the denial of travel rights to members of the Communist Party:

Furthermore, even if foreign travel by Communist Party members were essential to the activities of the organization, that fact could not justify the travel ban unless the activities in question were unlawful or endangered the national security. The Board, however, made no finding that the Party engages in or incites the use of any of the illegal means described in section 2 of the Act. The most that the Board found was that the Party advocates the forcible overthrow of the government as a matter of abstract doctrine. See *Communist Party v. S.A.C.B.*, *supra*, at 56 (ma-

¹⁰ The most recent date on which the Board found (p. 2598) that members of the Communist Party of this country attended Soviet schools for "training and instruction in the strategy and tactics of the world Communist movement." The Board's report refers to only four later instances of foreign travel. One (p. 2543) is that "a correspondent of the *Daily Worker* is stationed in Moscow." The other three concern travel by appellant Flynn to France and England in 1945, 1949 and 1950 (pp. 2605-06). The Board attached no significance to these visits. The only finding that any foreign Communist was in this country after 1936 was (p. 2528) that "as of 1945 Eisler was shown to be acting as an authoritative foreign Communist representative to [the Communist Party]." However, the Board made no finding as to the nature of Eisler's activities in this country, much less that his presence here furthered the purposes of the world Communist movement in any way.

majority opinion) and 130-33 (dissent of the Chief Justice). Advocacy of this sort is not unlawful and may not be punished. *Yates v. United States*, 354 U. S. 298; *Noto v. United States*, 367 U. S. 290; *Communist Party v. S.A.C.B.*, *ibid.* It follows that the fact that a Communist Party member may use foreign travel to promote such lawful advocacy cannot justify the denial of his right to travel.¹¹

Thus the justification for section 6 advanced by the Act lacks any factual foundation with respect to the Communist Party. Accordingly, the application of the Act to persons found to be members of the Party is an arbitrary and unreasonable and therefore invalid deprivation of their liberty. *Nebbia v. New York*; *Perez v. Brownell*, both *supra*.

2. The First Amendment.

Section 6 is invalid because it abridges freedom of association and, as here applied, freedom of expression.

The section bars travel solely because of membership in proscribed organizations. It is thus a discouragement of association.¹² Governmental measures which inhibit or

¹¹ The *Communist Party* case holds, (at 56) that a finding of unlawful acts or advocacy is not a constitutional prerequisite to the application of the registration provisions of the Act because in this aspect the Act "is a regulatory, not a prohibitory statute." While this may be true with respect to the disclosure requirements of Section 7, it is plainly not true of Section 6, which prohibits foreign travel to members of certain organizations and makes it a crime for them to apply for or use passports.

¹² This discouragement applies not only as to organizations which have been finally found to be Communist-action or front organizations, but also as to organizations against which registration proceedings are pending, threatened, or thought possible. Cf. *N.A.A.C.P. v. Button*, 371 U. S. 415, 434-36. The section also discourages persons from associating with organizations in ways short of actually joining, because of the possibility that government officials may consider

ganizational association are subject to First Amendment limitations. *N.A.A.C.P. v. Alabama*, 357 U. S. 449; *Bates v. Little Rock*, 361 U. S. 516; *Sweezy v. New Hampshire*, 254 U. S. 234, 250-61. Such limitations apply to legislation which deters membership in the Communist Party and participation in its legal advocacy and activity. *Scales v. United States*, 367 U. S. 203, 228-30; *Communist Party v. S.A.C.B.*, *supra*, at 88-105; *American Communications Association v. Douds*, 339 U. S. 382, 383, 402-04.

As here applied, the section also deprives appellants of the opportunity to study conditions abroad and to form opinions on the basis of what they see and hear. The situation is the same as if appellants were prohibited from going to lectures or reading books. Appellants are being denied the First Amendment "right to hear" (*United States v. C. I. O.*, 335 U. S. 106, 144), in contravention of the Amendment's function of facilitating self-government by insuring to the people unfettered access to information and ideas. See Chafee, *Free Speech in the United States* (1948) 33; Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) 91; *Gilbert v. Minnesota*, 254 U. S. 325, 337-38 (Brandeis, J., dissenting).¹³

Finally, both appellants desire to travel abroad to gather material for the pursuit of their professions as writers

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such association to be indicative of membership. Although this case does not, on its facts, present these applications of Section 6, "usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution." *Smith v. California*, 361 U. S. 147, 151.

¹³The denial of the right to learn applies not only to appellants but to virtually everyone whom Section 6 prevents from travelling. See *Kent v. Dulles*, *supra*, at 126-27.

and lecturers and to speak to European audiences—in Dr. Aptheker's case, to lecture at European universities. Freedom to travel for these purposes is a part of their freedom of expression just as "a newspaperman's right to travel is a part of the freedom of the press." *Worthy v. Herter*, 270 F. 2d 905, 908.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U. S. 415, 433. To the same effect, *Shelton v. Tucker*, 364 U. S. 479, 488; *Smith v. California*, 361 U. S. 147; *Talley v. California*, 362 U. S. 60, 63-64; *Butler v. Michigan*, 352 U. S. 380. Accordingly, a restraint on membership in the Communist Party may "not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent'." *Scales v. United States*, 367 U. S. 203, 229. And *DeJonge v. Oregon*, 299 U. S. 353, held that Communists may not be barred from engaging in peaceable speech and assembly even if it is assumed that the Communist Party on other occasions engages in illegal acts or advocacy. Cf. *Thomas v. Collins*, 323 U. S. 516, 540.

Section 6 violates these principles, even assuming that the findings of section 2 are supportable and that some American Communists sometimes go abroad for purposes that Congress has a right to prevent. For section 6 bars all Communists and many non-Communists¹⁴ from foreign travel for legitimate purposes, including the exercise of First Amendment rights. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, *supra*, at 383.

The vice of section 6 is compounded by the fact that its prohibition of foreign travel constitutes, as in the pres-

¹⁴ Members of Communist-front organizations and persons who the Passport Office merely "has reason to believe" are members of organizations ordered to register as Communist-action organizations.

ent case, a prior restraint on the exercise of First Amendment rights. The section therefore "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 272 U. S. 58, 70.

CONCLUSION

The questions are substantial, and the Court should note probable jurisdiction.

Respectfully submitted,

JOHN J. ABT,
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APPENDIX A—Opinion Below
IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 3478-62

ELIZABETH GURLEY FLYNN,

v.

DEAN RUSK, Secretary of State.

CIVIL ACTION No. 3886-62

HERBERT EUGENE APTHEKER,

v.

DEAN RUSK, Secretary of State.

Mr. Joseph Forer of Washington, D. C., and Mr. John J. Abt of the Bar of the State of New York, *pro hac vice*, by special leave of Court, for plaintiffs.

Mr. Benjamin C. Flannagan, Attorney, Department of Justice, with whom Mr. J. Walter Yeagley, Assistant Attorney General, and Mr. Oran H. Waterman, Attorney, Department of Justice, were on the brief, for defendant.

Before BURGER, *Circuit Judge*, HART and WALSH, *District Judges*.

On April 30, 1963, upon application of each plaintiff and agreement of the Government and after motion to

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convene a three-judge court was heard and granted, this Court was appointed to hear the question of the constitutional validity of section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. C. 785, as applied to the facts of the cases at bar.

The plaintiff Elizabeth Gurley Flynn filed suit on November 6, 1962, and the plaintiff Herbert Eugene Aptheker on December 14, 1962. The facts of each case are practically identical, and the cases were consolidated by order of the Court on April 29, 1963.

Section 6 of the Subversive Activities Control Act, provides, in pertinent part, as follows:

“(a) When a Communist organization as defined in paragraph (5) of Section 782 of this title, is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

“(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

“(2) to use or attempt to use any such passport.”

For the purposes of the questions here presented, the above section of the Act became effective October 20, 1961, when the Communist Party of the United States was ordered to register by a final order of the Subversive Activities Control Board, pursuant to the authority of section 7 of the Act, 50 U. S. C. 786, said section 7 having been previously upheld by the Supreme Court in *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1 (1961).

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On January 22, 1962, the Acting Director of the Passport Office notified both plaintiffs that their passports were revoked because of the belief by the Department of State that use of their passports would be in violation of the Subversive Activities Control Act. Plaintiffs were also informed of their right to a hearing. Subsequently, both passports expired: Mr. Aptheker's on December 9, 1962, and Mrs. Flynn's on March 9, 1963.

Administrative hearings were held at the request of the plaintiffs at which plaintiffs were represented by counsel but did not choose to appear personally. The hearing examiner, in each case, found the plaintiffs to be members of the Communist Party and affirmed the ruling of the Passport Office. Both plaintiffs subsequently were accorded hearings before the Board of Passport Appeals and the decisions of the hearing examiners were affirmed. The Secretary of State adopted the findings of the Board as to both plaintiffs and held,

"there is a preponderance of evidence in the record to show that at all material times [each plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act."

The matter is now before the Court on cross-motions for summary judgment, both parties stipulating that all administrative remedies have been exhausted. The plaintiffs agree that for the purpose of these proceedings, the Secretary of State had an adequate evidentiary basis for finding that plaintiff were members of the Communist Party. The plaintiffs further agree that the Secretary of State made findings on all matters required by section 6. The Secretary is not required, under the terms of the stat-

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ute, to make any findings as to the purpose of the travel for which the passport is requested and he in fact made none.

The validity of section 6 has not been determined by the courts, but such determination was reserved for future consideration in *Communist Party v. Control Board, supra*, at 79. The Supreme Court stated:

"It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport . . . None of these things may happen. If they do, appropriate administrative and judicial procedures will be available to test the constitutionality of applications of particular sections of the Act to particular persons in particular situations. Nothing justifies pre-empting those issues now."

Plaintiffs allege that they wish to travel abroad for recreation and study in pursuit of their profession as writers. They contend that section 6 of the Act is unconstitutional as applied to them for the following reasons:

(1) Plaintiffs are deprived without due process of law of their constitutional liberty to travel abroad, in violation of the Fifth Amendment to the Constitution of the United States;

(2) Plaintiffs' rights to freedom of speech, press and assembly are abridged in violation of the First Amendment.

(3) A penalty is imposed on plaintiffs without a judicial trial, and therefore constitutes a bill of attainder, in violation of article I, section 9 of the Constitution;

(4) Plaintiffs are deprived of the right to trial by jury as required by the Fifth and Sixth Amendments and article III, section 2, clause 3 of the Constitution; and

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(5) The action of the Secretary of State under section 6 constitutes imposition of a cruel and unusual punishment in violation of the Eighth Amendment.

The defendant admits all the material facts as alleged by the plaintiffs but denies that section 6 is unconstitutional. The defendant contends that the disqualification imposed by section 6 is a valid regulatory device, reasonably drawn to meet the dangers of foreign subversion and that it does not effect punishment for past activity but rather that it is a regulation of the activities of present members of the Communist Party necessary for the preservation of the Government.

It is admitted by both parties that if either plaintiff terminates his or her membership in the Communist Party that section 6 will no longer apply to him or her. They also agree that it would be a futile act for either plaintiff to apply for a passport or renewal of a passport until such membership is terminated. Indeed such application would be unlawful under section 6 of the Act as quoted above.

There is no contention that the administrative procedures provided by the defendant for determining plaintiffs' membership in the Communist Party were in any way inadequate or violated procedural due process.

The plaintiffs pray that the defendant be enjoined from enforcing section 6 of the Act and that defendant be ordered to reissue to each of them a valid United States passport.

The sole question to be decided by this Court is the constitutional validity of the section in question as applied to the facts of these cases. In order to properly decide this question it is necessary to view the enactment of the Subversive Activities Control Act of 1950 in its proper context.

In 1948 a Congressional Committee found that legislation was needed to

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“* * * cut the threads which bind the international Communist conspiracy together by restricting travel of members of the American section of the World Communist Movement.”

H. R. 1844, 80th Cong., 2d Sess., dated April 30, 1948. The same thought was expressed in the debates which preceded enactment of the Internal Security Act of 1950, 64 Stat. 987 *et seq.*, 50 U. S. C. 781 *et seq.*; 94 Cong. Rec. 5850 and 5851; H. R. 2981, 81st Cong. 2d Sess., dated August 22, 1950.

The Congress found in Section 2(1) of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781(1), that

“[t]here exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a worldwide Communist organization.”

The Congress also found in Section 2(6) of the Act that

“[t]he Communist action organizations so established and utilized in various countries, acting under such control, direction and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. * * *

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The Congress further found in Section 2(8) of the Act that

“[d]ue to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.”

The Congressional findings contained in the 1950 Act are binding on this Court. As the Supreme Court stated in the case of *Communist Party v. Control Board, supra*, at 94-95, with respect to the Congressional findings relating to the nature of the world Communist movement and the threat it poses to the security of the United States:

“It is not for the courts to re-examine the validity of these legislative findings and reject them. See *Harisiades v. Shaughnessy*, 342 U. S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half. [Footnote omitted.] Cf. *Nebbia v. New York*, 291 U. S. 502, 516, 530. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 U. S. 522, 529; *American Communications Assn. v. Douds*, 330 U. S. 382, 388-389.
* * *

In interpreting these same cases cited above, the Court of Appeals for the District of Columbia Circuit has stated:

“The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt those findings.” *Communist Party v.*

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Subversive Activities Control Board, 223 F. 2d 531, 565 (1954).

The plaintiffs nevertheless argue that the findings made by the Congress in the Subversive Activities Control Act of 1950 as to the dangers threatening our Government by the world Communist movement, and upheld by the Supreme Court in *Communist Party v. Control Board*, *supra*, were made some thirteen years ago and may not be considered binding on the courts at this time. There has been no evidence offered or adduced that the "leopard" of the world Communist movement has changed a single spot in the past thirteen years nor would common sense nor common knowledge indicate any such change.

In addition, section 13-(b) of the Act, 50 U. S. C. §792(b), contains the procedure whereby an organization which has been required to register by a final order of the Subversive Activities Control Board may seek the cancellation of such registration. On proper showing, the Board could cancel their prior registration order and the members of the organization would be under no impediment as to the use or issuance of passports. To our knowledge, the Communist Party has not sought to utilize the procedures under section 13 (b).

The findings of the Congress made in section 2 of the Subversive Activities Control Act of 1950 are therefore as valid and as binding on this Court today as on the day on which they were made. It is in the light of these congressional findings that the plaintiffs' claims of unconstitutionality of section 6 of the Act must be judged.

Denial of a passport to a citizen is a denial of the right to travel outside the United States. *Worthy v. Herter*, 270 F. 2d 905 (D. C. Cir., 1959), *Cert. den.*, 361 U. S. 918. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent v. Dulles*, 357 U. S. 116, 125

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(1958). The Supreme Court further noted in *Kent* that "[i]f that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129. The Supreme Court in *Kent* did not review the constitutionality of the restrictions on travel involved in that case. It merely held that the Secretary of State did not have the authority to deny passports to citizens because of their alleged Communistic beliefs and associations and their refusal to file affidavits concerning their membership in the Communist Party when sections 2 and 6 of the Subversive Activities Control Act had not yet become effective. The Court said it would be

"strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to taitail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations." *Id.* at 130.

It is clear in the present case that certain liberties of these plaintiffs, as alleged by them in their brief in these consolidated cases and in oral argument before this Court, are being restricted. Restriction or regulation of liberty, however, by no means indicates constitutional invalidity of the regulatory scheme. As the Supreme Court stated in *Communist Party v. Control Board*, *supra*, at 96-97,

"Individual liberties fundamental to American institutions are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers. But where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combina-

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tion of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods. Especially where Congress, in seeking to reconcile competing and urgently demanding values within our social institutions, legislates not to prohibit individuals from organizing for the effectuation of ends found to be menacing to the very existence of those institutions, but only to prescribe the conditions under which such organization is permitted, the legislative determination must be respected. *United Public Workers v. Mitchell*, 330 U. S. 75; *American Communications Assn. v. Douds*, *supra*."

In the *Douds* case cited, the Court upheld the validity of Section 9(h) of the National Labor Relations Act which denies the benefits of certain provisions of that Act to labor organization officers who have not filed non-Communist affidavits. The opinion, 339 U. S. at 390-91, states, "We think it is clear, in addition, that the remedy provided by § 9(h) bears reasonable relation to the evil which the statute was designed to reach."

Such is the case here. In view of the findings by the Congress set forth above, we hold that the enactment by Congress of section 6, which prohibits these plaintiffs from obtaining passports so long as they are members of an organization—in this case the Communist Party—under a final order to register with the Attorney General, see 50 U. S. C. § 786(a), is a valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regulatory scheme bears a reasonable relation thereto. Under circumstances such as these, our basic

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system of democracy permits the reasonable deprivation of the liberty of certain of its citizens who are brought within the proscriptions of a legislative determination by due process of law. We further hold that the deprivation of liberty, such as it is as applied to these plaintiffs, is not a cruel and unusual punishment in violation of the Eighth Amendment, but is rather a reasonable regulation of conduct which bears a direct relation to the evil Congress has found inimical to the interests of the United States as a sovereign nation. See section 2(8) of the Act quoted above.

It is argued that substantive due process of law is denied the plaintiffs herein because section 6 of the Subversive Activities Control Act requires the denial of a passport upon a mere finding that the plaintiffs are members of the Communist Party and because the Act does not go further and require a determination that the plaintiffs do not wish to travel abroad simply for personal reasons of pleasure and recreation, but that they in fact intend to travel abroad for the additional purpose of carrying on activities to further the purposes of the world Communist movement. In other words, the plaintiffs argue that Congress may not conclusively presume that the plaintiffs, who have admittedly been lawfully determined to be members of the Communist Party, which in turn has lawfully been determined to be a Communist-action organization as defined in section 3 (3) of the Act, 50 U. S. C. § 782(3), will act as members of the Communist Party while travelling abroad. They say the defendant-Secretary must presume that they are travelling for purely innocent purposes unless procedures are provided for determining their thoughts and intentions and it is affirmatively found that it is their thought and intention to act as members of the Communist Party and to carry on activities while abroad to further the purposes of the world Communist movement.

We hold that for Congress conclusively to presume that a member of a Communist-action organization while travel-

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ling abroad will act like a member of such an organization as defined by the statute—by carrying on activities to further the purposes of the world Communist movement which presents “a clear and present danger to the security of the United States and to the existence of free American institutions,” section 2(15) of the Act, 50 U. S. C. § 781(15)—is not so unreasonable as to violate the plaintiffs’ constitutional rights. We so hold in light of the Congressional findings set forth in section 2 of the Act, mindful of the peculiar and fundamental nature of those findings, and in light of the lawful procedures set forth in the Act, and followed in these cases before us, for determining whether an organization is a Communist-action organization and whether the individual citizens involved are knowingly members of such an organization.

The record in these cases, furthermore, shows that the plaintiff Flynn joined the Communist Party in 1937, has been a member of the National Committee of the Communist Party since 1938, and is currently the Chairman of the Communist Party of the United States of America. The plaintiff Aptheker joined the Party in 1939 and is presently Editor of *Political Affairs*, the self-described “theoretical organ of the Communist Party” of the United States. These facts are undisputed for purposes of the motions for summary judgment before this Court on review of the administrative proceedings below. Thus these plaintiffs clearly have meaningful associations with the Communist Party in this country, to say the least. This fact negates, in these cases, any unknowing or naive relationship with the organization under a final order to register with the Attorney General of which these plaintiffs are members. The Congressional presumption therefore retains a notable vitality. See *Gastelum-Quinones v. Kennedy*, 31 U. S. L. Week 4637 (U. S. June 17, 1963); *Rosoldt v. Perfetto*, 355 U. S. 115, 120 (1957); *Galvan v. Press*, 347 U. S. 522, 528 (1954).

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The plaintiffs contend that section 6 is a bill of attainder, but as was said in the *Douds* case, 339 U. S. at 413-14:

“* * * in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9(h) is intended to prevent future action rather than to punish past action.

“This distinction is emphasized by the fact that members of those groups identified in § 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past.” [Emphasis in original.]

The same situation exists here. Section 6 would not be a bar to the issuance or use of a passport if the plaintiffs renounced their present membership in the Communist Party. See also *Trop v. Dulles*, 356 U. S. 86, 95 (1958); *United States v. Lovett*, 328 U. S. 303, 315 (1946); *Cummings v. Missouri*, 71 U. S. (4 Wall.) 356, 363 (1866).

In the instant case the restriction is not as severe as that in the *Douds* case, where the individuals were “subject to possible loss of position.” Here, the plaintiffs are free to travel throughout the United States and most of the Western Hemisphere. The limitation on their right to travel is restricted to those countries which require a United States citizen to have a passport to enter their borders.

It was also stated in *Communist Party v. Control Board*, 367 U. S. 1, 86-87,

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"The [Subversive Activities Control] Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage. * * * Present activity constitutes an operative element to which the statute attaches legal consequences * * *"

It is clear to this Court that section 6 of the Act is not penal nor is it a bill of attainder. It is instead a legitimate exercise of the authority of Congress to regulate the travel of members of Communist organizations, based on the legislative determination that such travel would be inimical and dangerous to the security of the United States.

We therefore hold that the Constitution does not prohibit the denial of passports to plaintiffs as present members of a Communist organization under section 6 of the Subversive Activities Control Act of 1950.

Defendant's motions for summary judgment are granted as to each case.

The plaintiffs' motions for summary judgment in each case are denied.

The plaintiffs' requests for permanent restraining orders against the defendant are denied.

s/ **Leonard P. Walsh**
LEONARD P. WALSH

July 12, 1963

APPENDIX B—Judgment Below
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 3478-62

ELIZABETH GURLEY FLYNN,

Plaintiff,

v.

THE SECRETARY OF STATE,

Defendant.

CIVIL ACTION No. 3886-62

HERBERT APTHEKER,

Plaintiff,

v.

THE SECRETARY OF STATE,

Defendant.

ORDER

The cause having come before the Court on cross-motions of the parties for summary judgment, and the Court having considered all of the pleadings and exhibits, filed and having heard the oral argument of counsel for each side, and the Court on July 12, 1963, having issued and filed its opinion, it is therefore by the Court this 2nd day of August, 1963:

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ORDERED that plaintiffs' motions for summary judgment as to each case be, and the same hereby are, denied; and that plaintiffs' requests for permanent restraining orders against the defendant be, and the same hereby are, denied; and it

FURTHER ORDERED that the defendant's motions for summary judgment as to each case be, and the same hereby are, granted, and that the actions be, and the same hereby are, dismissed, with costs to the defendant.

s/ WARREN E. BURGER
*United States
 Circuit Judge*

s/ G. L. HART, JR.
*United States
 District Judge*

s/ LEONARD P. WALSH
*United States
 District Judge*